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No. 86-1034

In the Supreme Court of the United States

OCTOBER TERM, 1987

COMMONWEALTH OF VIRGINIA, APPELLANT

v.

AMERICAN BOOKSELLERS ASSOCIATION, INC., ET AL., APPELLEES

On Appeal from the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM AND SUPPLEMENTAL MEMORANDUM FOR THE APPELLEES

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MOTION FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM FOR THE APPELLEES

Pursuant to Rule 35.6 of the Rules of this Court, appellees seek leave to file the attached supplemental memorandum addressing the propriety of certifying questions concerning the scope of the Virginia juvenile display statute (Va. Code § 18.2-391(a)) to the Supreme Court of Virginia. The issue of certification was not discussed in the briefs of the parties and was raised for the first time at oral argument. As a result, the Court has not received a focused presentation on the question whether certification would be appropriate in this case. Appellees believe that the considerations mentioned in this short supplemental memorandum would be relevant to the Court's decision.

It is therefore respectfully submitted that the motion for leave to file the attached supplemental memorandum should be granted.

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NOVEMBER 1987

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On Appeal from the United States Court of Appeals for the Fourth Circuit

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SUPPLEMENTAL MEMORANDUM FOR THE APPELLEES

In this case, the district court and the court of appeals construed the Virginia juvenile display statute (Va. Code § 18.2-391(a)) to apply to a broad range of constitutionally-protected materials available in general bookstores within the State (J.S. App. A8-A10 & n.9). Based on that determination, both lower courts held the statute unconstitutional.

When the case was pending in the district court, Virginia requested that the court abstain "so that state courts may be given the opportunity to construe the 1985 amendment and determine its constitutionality" (J.S. App. A24). The district court declined to do so on the ground that "state court resolution of this matter would

not render unnecessary, nor substantially modify the federal constitutional questions" (*ibid.*). Virginia did not challenge that abstention ruling on appeal, nor did it request, in either its petition for a writ of certiorari or its brief on the merits, that this Court defer its resolution of the First Amendment question until the state courts had an opportunity to interpret the statute.

Nonetheless, the suggestion was raised at oral argument that the Court may wish to resort to the Virginia certification procedure, whereby the Virginia "Supreme Court may in its discretion answer questions of [state] law certified to it by" any federal court. Va. S. Ct. R. 5:42 (a) (1987). We believe that certification would not be appropriate.

First, there is a serious question whether the Virginia Supreme Court would accept a certification in this case. The state certification rule applies only where "a question of Virginia law *is determinative* in any proceeding pending before the certifying court" (Rule 5:42(a) (emphasis added)), and even then the Virginia Supreme Court has complete "discretion * * * whether to answer any certified question of law." Rule 5:42(e). Here, even if the Virginia Supreme Court could somehow adopt a plausible narrowing interpretation of the broad language of the 1985 amendment, it is most unlikely that that ruling would be "determinative" of appellees' First Amendment claims, because the state statute would still prohibit some quantity and category of constitutionally protected materials from being displayed on a bookstore's open shelves. Thus, this may not be the sort of situation to which the Virginia certification procedure was meant to apply.*

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* See Wright, Miller & Cooper, *Federal Courts and Procedure* § 4248 at p. 528 (1978):

> In a state that will answer questions only if any answer will dispose of the case, federal courts will have to refrain from

In any event, it is doubtful whether the Virginia Supreme Court could provide this Court with a meaningful narrowing interpretation of the juvenile display provision. Given the plain language of the statute and the breadth of many of its key terms, there is simply no way that the state court could construe a particular word or a particular phrase to eliminate the constitutional problem. To be sure, the Virginia Supreme Court could perhaps answer specific questions whether *Portnoy's Complaint*, or *Hollywood Wives*, or a host of other disputed books fall within the prohibitions of the 1985 amendment, but those *ad hoc* determinations would provide no intelligible standard by which booksellers could judge (on pain of criminal penalties) whether thousands of other volumes may be displayed on their shelves.

If there were any doubt on this score, it is dispelled by the recent experience in the identical context of the Georgia juvenile display statute, OCGA § 16-12-103(e). The district court preliminarily enjoined enforcement of the statute and then abstained (*American Booksellers Ass'n, Inc.* v. *Webb*, 590 F. Supp. 677 (N.D. Ga. 1984)), and both sides appealed to the Eleventh Circuit. The court of appeals then invoked the Georgia certification provisions and certified the following question to the Georgia Supreme Court: "How does the Georgia Supreme Court construe the provisions * * * which have been challenged in this suit?" *American Booksellers Ass'n, Inc.* v. *Webb*, 744 F.2d 784, 786 (11th Cir. 1984). The Georgia Supreme Court declined the certification, noting that the statute might be applied in a variety of situations and that it would be "inappropriate for this court to establish the parameters within which the Act may or may not

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certifying questions that are not of this sort. This would bar all use of certification in Pullman-type cases, where by hypothesis a federal constitutional question will have to be decided by the federal court if the statute is not interpreted in a way that avoids the constitutional question.

be operative." *American Booksellers Ass'n, Inc.* v. *Webb*, 329 S.E.2d 495, 498 (Ga. 1985). Here, too, resort to the state certification procedure would result only in confusion and delay.

In sum, because the State has never asked this Court for abstention or certification, because it is questionable whether the Virginia certification procedure even applies to this case, and because the State has not put forward a textually plausible construction of the juvenile display provision that would eliminate its patent constitutional defects, there would be no purpose served by certifying the question of statutory construction to the Virginia Supreme Court.

Respectfully submitted.

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